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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2855-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

EDUARDO J. LESMES,

Defendant-Appellant.

Argued October 11, 2023 – Decided June 14, 2024

Before Judges Rose and Smith.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 17-02-0500.

Oleg Nekritin argued the cause for the appellant (Robert J. De Groot, attorney; Robert J. De Groot, of counsel and on the brief; Oleg Nekritin, on the brief).

Braden Bendon Couch, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent (Theodore N. Stephens, II, Acting Essex County Prosecutor, attorney; Caroline C. Galda, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

After a trial, defendant Eduardo J. Lesmes appeals his convictions and sentence after a jury found him guilty of: fourth-degree aggravated assault with a firearm, N.J.S.A. 2C:12-1(b)(4); two counts of second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a); and two counts of third-degree terroristic threats, N.J.S.A. 2C:12-3(a). Defendant argues: the trial court committed error by improperly joining offenses related to two separate victims; the prosecutor made improper remarks during trial; the prosecutor improperly boosted a witness's credibility; and the State arbitrarily denied his request for a waiver under the Graves Act, N.J.S.A. 2C:43-6(c) following his conviction and immediately before his sentencing. For the reasons that follow, we vacate defendant's convictions and remand for separate trials on the charges pertaining to each victim.

I.

We summarize the pertinent facts from the trial. Defendant owned and operated a bar in Newark. On September 1, 2016, around 9:00 p.m., Anyelo Luis met defendant at the bar to install additional storage space for the bar's security camera system. Luis testified defendant disagreed with the cost of the installation service and became angry. In a moment captured by the security

camera, defendant unholstered his firearm and waived it, briefly pointing its muzzle towards Luis. Luis testified that defendant then emptied bullets from the gun and placed them on the bar, saying "I got one bullet for . . . your mom, for your father, your kids, your wife." Luis retrieved the incident footage from the bar's system, transferred it to a USB drive, and later gave it to police. Luis also disconnected the system, preventing any additional footage from being recorded that night.

At around 9:30 p.m. the same night, Alexander Faria visited the bar. Faria was a regular patron and described himself as a friend of defendant. Faria testified that shortly after he arrived, defendant approached, unholstered his firearm, and held it to the right side of Faria's neck. According to Faria, the two then fell to the floor. When they regained their footing, Faria tried to grab defendant, but two people held him back. Faria was taken outside where defendant slapped him and told him not to come back or he would deport and kill him. Defendant was upset that Faria helped one of defendant's employees find a job at a nearby restaurant. Faria testified he left and sat outside a nearby bar he also frequented where he calmed down. Faria then walked alone to the police station where he filed a report and identified defendant.

At around 10:00 p.m., Newark Police Officers Michael Chirico and Javier Rivera arrived at defendant's bar after Rivera received a call on his personal cell phone from the bar's manager, Sylvana Nascimento, who requested Officer Chirico's help "as a friend." Officer Chirico had been a regular patron of the bar for twenty-five years and was familiar with defendant and Nascimento. Officer Chirico testified that, about eight years ago, he endorsed defendant's permit to carry the handgun at issue in this case. Nascimento asked the on-duty officers if they could safekeep defendant's firearm because the bar's safe was malfunctioning and a gun had been stolen from the bar a couple of months earlier. Officer Chirico testified defendant said he wasn't feeling well and may have been intoxicated or sick. Officer Rivera retrieved the gun from a drawer behind the bar with the intention to hold it in a lockbox in the trunk of his squad car for the night and return it the next day.

Because the officers secured the gun as a personal favor, Officer Chirico did not initially intend to write a report. However, he wrote two reports regarding retrieval of the gun after he learned the next day that it may have been used in an incident at the bar. Officer Rivera gave the gun to detectives.

Defendant and Nascimento each testified to an alternative version of events. Nascimento testified Faria was a regular who "seem[ed] drunk" on the

night in question and complained to defendant when she refused to serve him. Nascimento further testified defendant asked Faria to leave, which he did willingly. She did not see defendant point his firearm at Faria nor physically remove him from the bar. She testified she called Officer Rivera on her own initiative to have him collect defendant's gun.

Defendant denied pointing his handgun at or threatening either Luis or Faria, and he denied slapping Faria. Defendant testified he explained to the officers he left the gun in the drawer because he had to leave to pick up his daughter. He also testified he didn't want to leave the gun in his apartment because he previously had a gun stolen.

Defendant was charged in an Essex County indictment with: two counts of fourth-degree aggravated assault; two counts of second-degree unlawful possession of a handgun; two counts of second-degree possession of a weapon for an unlawful purpose; and two counts of third-degree terroristic threats. Prior to trial, the State dismissed the unlawful possession of a handgun charges after learning defendant had a valid permit for the weapon.

Defendant moved to sever the counts relating to each victim, and the motion judge denied relief. The motion judge performed a Cofield¹ analysis, finding: the "evidence of . . . both crimes goes to the defendant's knowledge in that he was aware and knew what he was doing"; the two incidents were similar in kind and close in time; "defendant allegedly committed the crime on two separate occasions, which also shows that there was an absence of mistake or accident"; there was clear and convincing evidence presented; and the probative value outweighed any prejudice.

Trial and sentencing took place before a different judge, and prior to sentencing, defendant moved for judgment notwithstanding the verdict pursuant to Rule 3:18-2 or, alternatively, for a new trial pursuant to Rule 3:20-1. The second judge denied the motion, ordered the appropriate mergers, and sentenced defendant to an aggregate five-year term of imprisonment with forty-two months of parole ineligibility pursuant to the Graves Act, N.J.S.A. 2C:43-6(c) on the remaining weapons convictions. The judge held an Alvarez² hearing on

¹ State v. Cofield, 127 N.J. 328 (1992).

² State v. Alvarez, 246 N.J. Super. 137 (App. Div. 1991).

December 3, 2021, after which it denied defendant's motion to compel a Graves Act waiver.

Defendant raises the following points on appeal:

I. THE COURT MUST REVERSE THE VERDICT DUE TO IMPROPER JOINDER WHICH DENIED . . . DEFENDANT A FAIR TRIAL.

A. THE COURT ERRED WHEN IT RULED THAT JOINDER WAS APPROPRIATE TO SHOW DEFENDANT'S LACK OF ACCIDENT OR MISTAKE.

B. THE COFIELD ANALYSIS MILITATED AGAINST PERMITTING JOINDER.

C. THE COURT'S ERROR WAS NOT HARMLESS.

II. THE COURT COM[M]ITTED PLAIN ERROR BY FAILING TO ISSUE A LIMITING INSTRUCTION AS TO OTHER CRIMES OR WRONGS EVIDENCE.

III. THE COURT MUST REVERSE THE VERDICT DUE TO THE STATE IMPROPERLY ARGUING DURING ITS OPENING, AT TRIAL, AND DURING CLOSING ARGUMENT THAT . . . DEFENDANT WAS A "HOTHEAD" WHO ACTED IN CONFORMITY WITH HIS CHARACTER TRAIT OF BEING CONFRONTATIONAL.

IV. THE STATE'S INFLAMMATORY AND INACCURATE REMARKS ABOUT . . . DEFENDANT, MISCHARACTERIZING EVIDENCE PRESENTED AT TRIAL, AND ACCUSING . . . DEFENDANT OF CONSPIRING WITH POLICE

OFFICER WITNESSES TO COMMIT UNCHARGED CRIMINAL CONDUCT, ALL NECESSITATE REVERSAL.

V. THE STATE IMPROPERLY BOOSTED THE CREDIBILITY OF FARIA BY MAKING FALSE ASSERTIONS.

VI. THE GUILTY VERDICT MUST BE REVERSED DUE TO THE STATE MISLEADING DEFENSE COUNSEL ABOUT LUIS'S AVAILABILITY AND THE COURT NOT PERMITTING DEFENSE COUNSEL TO SUPPLEMENT HIS OPENING STATEMENTS.

VII. THE COURT ERRED BY NOT COMPELLING THE STATE TO GRANT . . . DEFENDANT'S REQUEST FOR A GRAVES [ACT] WAIVER.

A. THE STATE CANNOT DENY A GRAVES ACT WAIVER BASED ON AN ARBITRARY REASON.

B. THE ATTORNEY GENERAL GUIDELINES RENDER THE STATE'S APPLICATION OF THE GRAVES [ACT] WAIVER STATUTE AS UNCONSTITUTIONAL DUE TO THE GUIDELINES BARRING WAIVERS POST TRIAL.

C. THE STATE'S DECISION TO DENY THE DEFENDANT A GRAVES [ACT] WAIVER WAS CONSTITUTIONALLY DEFECTIVE.

II.

The scope of our review of a court's decision on a severance motion is limited. We afford deference when reviewing a trial court's decision whether to try a defendant on multiple counts simultaneously or to sever counts. State v. Sterling, 215 N.J. 65, 73 (2013). Additionally, "[t]he decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion." State v. Scott, 229 N.J. 469, 479 (2017) (quoting In re Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 383-84 (2010)). We thus apply "a deferential standard in reviewing a trial court's evidentiary rulings and uphold its determinations 'absent a showing of an abuse of discretion.'" Ibid. (quoting State v. Perry, 225 N.J. 222, 233 (2016)).

"[A]n abuse of discretion arises when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Matter of B.B., 472 N.J. Super. 612, 619-20 (App. Div. 2022) (quoting State v. R.Y., 242 N.J. 48, 65 (2020)); Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002). "A reviewing court must not 'substitute its own judgment for that of the trial court's unless there was a "clear error in judgment"—a ruling "so wide of the mark that a manifest denial of justice resulted.'"" Ibid. (quoting State v. Marrero, 148 N.J. 469, 484 (1997)). Critically, "the interpretation of law 'and the consequences that flow from

established facts' are not entitled to deference and are reviewed de novo." State v. Carrion, 249 N.J. 253, 279 (2021) (quoting State v. Hubbard, 222 N.J. 249, 263 (2015)).

III.

We first consider whether the trial court erred by denying defendant's motion to sever. Defendant acknowledges he possessed the gun, but he contends he did not use it unlawfully. He claims the failure to sever the charges created unfair prejudice permitting the State to argue he was "a temperamental hothead who acted in conformity with his character." We conclude an analysis of the Cofield factors shows defendant's charges should have been severed.

Rule 3:7-6 permits the State to charge multiple offenses in a single indictment "if the offenses charged are of the same or similar character or are based on the same act or transaction or on [two] or more acts or transactions connected together." We recognize that while "joinder is favored, economy and efficiency interests do not override a defendant's right to a fair trial." State v. Smith, 471 N.J. Super. 548, 567 (App. Div. 2022) (quoting Sterling, 215 N.J. at 72-73).

"Rule 3:15-2(b) vests a trial court with discretion to order separate trials if joinder would prejudice unfairly a defendant." State v. Chenique-Puey, 145

N.J. 334, 341 (1996). "To avoid prejudicial joinder, the court must conclude the proffered evidence for each set of charges would be admissible in a separate trial on the other set of charges." Smith, 471 N.J. Super. at 567. The court must therefore consider whether the "N.J.R.E. 404(b) requirements [are] met, and the evidence of other crimes or bad acts [is] 'relevant to prove a fact genuinely in dispute and the evidence is necessary as proof of the disputed issue.'" Ibid. (alterations in original) (quoting Sterling, 215 N.J. at 73).

Rule 404(b) bars the admission of other-crimes evidence "to prove a person's disposition in order to show that . . . the person acted in conformity with such disposition." N.J.R.E. 404(b). Other-crime evidence is, however, admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident when such matters are relevant to a material issue in dispute." Ibid. In Cofield, the Court established a multi-factor test to determine when and in what circumstances "other crime" evidence is admissible in a criminal trial. 127 N.J. at 338. The Cofield factors are:

- (1) The evidence of the other crime must be admissible as relevant to a material issue;
- (2) It must be similar in kind and reasonably close in time to the offense charged;
- (3) The evidence of the other crime must be clear and convincing;
- and (4) The probative value of

the evidence must not be outweighed by its apparent prejudice.

[Ibid.]

The first Cofield factor requires evidence to be relevant to a material issue. Ibid. Because defendant did not contest possessing the weapon, we disagree with the trial court the evidence was relevant to knowledge or absent of mistake, which were not material issues in dispute. See Smith, 471 N.J. Super. at 569-70. We conclude the first Cofield factor is not satisfied.

Under Cofield's second factor, the evidence proffered "must be similar in kind and reasonably close in time to the offense charged." State v. Rose, 206 N.J. 141, 159 (2011) (quoting Cofield, 127 N.J. at 338). This presents no issue. "Our courts have found the 'reasonably close in time' aspect to be satisfied where there were longer periods of time" than one year between the proffered acts. State v. Castagna, 400 N.J. Super. 164, 179 (App. Div. 2008). Here, the State alleged the two similar incidents took place within thirty minutes, and thus were "reasonably close in time" for purposes of the Cofield analysis. Castagna, 400 N.J. Super. at 179.

Under Cofield's third factor, the State must establish the act occurred by clear and convincing evidence. Rose, 206 N.J. at 160 (quoting Cofield, 127 N.J. at 338). We have previously found the State satisfied this factor upon presenting

the testimony of multiple witnesses tending to show the act occurred. Castagna, 400 N.J. Super. at 179-80; State v. Gillispie, 208 N.J. 59, 89 (2011). The record shows that the State's proofs included both victims' testimonies, and a video recording of defendant pointing his gun at Luis. Taken together, this testimony and documentary evidence satisfies factor three. Rose, 206 N.J. at 160 (quoting Cofield, 127 N.J. at 338); Castagna, 400 N.J. Super. at 179-80.

Regarding the fourth Cofield factor, the State's proofs on two sets of charges against separate victims in the same trial unduly prejudiced defendant by posing a significant risk the jury would base their decision on impermissible character evidence. Such a presentation had the capacity to lead the jury to infer that defendant was acting in conformity with a "temperamental hothead" character trait. The probative value of the cumulative evidence of each incident presented to the jury was outweighed by its obvious prejudice to defendant. The fourth Cofield factor is not satisfied.

We conclude the motion court erroneously denied defendant's motion to sever. Defendant should have been tried separately, once for each victim.

Given our conclusion that severance was proper, we briefly comment on defendant's remaining arguments. Defendant challenges certain statements

made by the prosecutor during trial. We agree that the State's characterization of defendant as a "hothead" was out of bounds. See Rule 404(a)(1).

"[T]he primary duty of a prosecutor is not to obtain convictions, but to see that justice is done. Thus, a prosecutor's duty is twofold: a prosecutor must refrain from improper methods that result in a wrongful conviction and is obligated to use legitimate means to bring about a just conviction." State v. Smith, 167 N.J. 158, 177 (2001). A prosecutor is "not permitted to cast unjustified aspersions on the defense or defense counsel." Ibid.

While improper, the prosecutor's "hothead" remarks were not so egregious that they "substantially prejudiced defendant's fundamental right to have a jury fairly evaluate the merits of his defense." State v. Wakefield, 190 N.J. 397, 438 (2007) (quoting State v. Papasavvas, 163 N.J. 565, 625 (2000)). Because defendant failed to object to the remarks at the time of trial, we review the prosecutor's comments for plain error. R. 2:10-2. In view of the court's final instruction to the jury concerning its role in considering the arguments of counsel, we conclude the remarks were not "so egregious that [they] deprived the defendant of a fair trial," State v. McGuire, 419 N.J. Super. 88, 139 (App. Div. 2011) (quoting State v. Ramseur, 106 N.J. 123, 322 (1987)), nor "clearly capable of producing an unjust result," R. 2:10-2.

We see no need to comment further on defendant's other arguments as they relate to evidentiary and sentencing matters best left to the sound discretion of the trial court on remand, as circumstances require.

Reversed and remanded for proceedings consistent with this opinion.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



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